No. 15834

IN THE

United States Court of Appeals

for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD W. ANDERSON and LLOYD CAMPBELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

Appeal from the United States District Court
for the District of Montana

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A. STATEMENT OF JURISDICTION

The United States District Court for the District of Montana, Great Falls Division, the lower Court herein, had jurisdiction by reason of the fact that the Plaintiff and Appellee herein is the United States of America, the same being alleged by the Plaintiff in the complaint (Tr. p. 3), and also by the provisions of the Rules of Civil Procedure for the District Courts of the United States.

The above-named Circuit Court of Appeals has jurisdiction to review the judgment given herein by reason of the aforesaid Rules of Civil Procedure, and by reason of the fact that the case arose within the State of Montana and which State is within the jurisdiction of the above-entitled Circuit Court of Appeals for the Ninth Circuit.

B. STATEMENT OF THE CASE

The United States Government, as Agent for the Blackfeet Indian Tribe, and Appellee, filed suit against the Defendant, Robert Aiken, and his sureties, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell, by virtue of a lease to the defendant dated January 1st, 1944, which is hereinafter referred to as the "1944 lease," and also on a lease between the parties dated March 14th, 1946, which lease is hereinafter referred to as the "1946 lease," the suit being filed August 27th, 1952.

The complaint in substance demanded payment from the defendant, Robert Aiken, for operation and maintenance charges assessed against the Indian lands covered by the leases, which assessments are referred to herein as "O & M charges" or "irrigation charges."

The plaintiff alleged that the 1944 lease, through mutual mistake and inadvertence, omitted to mention O & M charges, and the plaintiff asked for a reformation of that lease to include such charges.

The 1944 lease by its terms was for a period of five years commencing January 1st, 1944 (Tr. p. 15). The

1946 lease terminated on December 31st, 1950 (Tr. p. 32). The 1944 lease was on a different printed form than the 1946 lease which contained a paragraph that the lessee agreed to pay all operation and maintenance assessments annually in advance (Tr. p. 33). The defendant denied that the lease land was irrigable, and alleged that the same was dry land and that the existing system of canals and ditches serving the irrigation district was inadequate, and it was impossible to irrigate the land in question due to the location and character of such leased lands.

The defendant further alleged that if the irrigation rental was payable in advance of each season, that the Government waived such provision by not insisting on the payment thereof in advance as required by the 1946 lease (Tr. p. 40). In addition, the defendant generally denied any amount was owing to the Government for any water charges.

The case was tried January 18th, 1956, which resulted in the Honorable Charles N. Pray rendering a decision herein which was filed September 4th, 1957 (Tr. p. 52).

It is undisputed in this case that no irrigation was either called for, or used by the defendant on any of the leased lands, and plaintiff did not offer to furnish any such water (Tr. p. 239).

This action was commenced nearly two years after the expiration of the 1946 lease, and four years after the termination of the 1944 lease.

C. SUMMATION OF TESTIMONY

The defendant's unrebutted evidence showed that the land had been farmed prior to, and subsequent to, his leases as dry land. There was a conflict in the testimony whether it was possible to furnish water through the existing systems of canals and irrigation ditches to the lands leased by the defendant, Robert Aiken.

1. Witnesses for Plaintiff

The plaintiff's case consisted of testimony by Irrigation Project Engineers, a ditch rider, and a Superintendent of the Blackfeet Indian Reservation. These witnesses all based their testimony on files, surveys, maps, and records in the irrigation project office, rather than on a personal and physical inspection of the land in question during the time of the defendant's leases to determine actual facts.

The plaintiff's testimony further disclosed that the ditches on the land were constructed about 1916 (Tr. p. 82), and there was no testimony as to the condition of the ditches during the period defendant leased the lands in question. A topographical map of the land was introduced by the Government, and witnesses were allowed to testify as to the irrigability of the land based only on such topographical map rather than a physical inspection of the land (Tr. p. 92).

The Government further urged that its authority for existing irrigation charges was based upon a directive from the Department of the Interior (Tr. p. 118), and a regulation of such department, Regu-

lation 25 C.F.R. 171.26, and published 7 F. R. 3958, reading as follows:

> "171.26, Leases or Permits, irrigable lands. Leases and Permits of restricted allotted or tribal Indian lands within an irrigation project shall require the lessee, or permittee, to pay on the due date annually in advance during the term of the instrument, and in amounts determined by orders of the Secretary of the Interior, the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease or permit, and the irrigation charge shall be in addition to the rental payments prescribed in the lease or permit. All payments of such irrigation charges and penalties shall be made to the Superintendent or other designated officer."

This directive was not contained in the 1944 lease (Tr. p. 118), as it was in the 1946 lease.

A ditch rider, Frank Kuka, testified briefly that he had observed water in several ditch laterals, but there was no testimony these laterals were in close proximity to the defendant's leased land. His testimony was rather sketchy with reference to when the water was put into ditches, and the condition of the ditches and laterals during the defendant's tenancy. The topographical map, plaintiff's Exhibit No. 2, shows several ditches located in close proximity to the defendant's land, but there was no testimony introduced by the Government to show the condition of the ditches as they existed in 1944, or during the defendant's tenancy.

In support of the Government's attempt to reform the 1944 lease, Charles S. Spencer, the Superintendent

of the Blackfeet Indian Reservation since September 1st, 1954, long after the defendant's leases terminated, admitted that the 1944 lease contained no direct agreement by the defendant to pay O & M charges (Tr. p. 168), when he testified:

> "A. That is a '29 form that was used for some reason unkown to me in lieu of the proper form that should have been used at the time and which was used in the other lease."

At the conclusion of the plaintiff's case the defendant moved to dismiss the First Cause of Action on the grounds that the Government had failed to sustain the burden of proof by a preponderance of the evidence, or any evidence whatsoever, that by mutual mistake and inadvertence of the parties, O & M charges were omitted from the 1944 lease and that the defendant agreed to pay the same (Tr. p. 171).

This motion was denied by the Court, and the defendant assigns this ruling as error.

The defendant further moved to dismiss the Second Cause of Action, which referred to the 1946 lease, on the grounds that the Government had failed to prove the allegations thereof, and this motion was likewise denied by the Court, which ruling the defendant has assigned as error (Tr. p. 171).

2. Witnesses for Defendant

The defendant's first witness, Henry L. Henneman, who farmed for the preceding fifteen years (Tr. p. 174), and succeeded Mr. Aiken in farming the lands

covered by the instant action for seven years, substantially testified as follows:

That he had used no water on the land covering the defendant's leases, and had only paid O & M charges for one year, 1955, during his seven years of leasing (Tr. p. 178); that two types of leases were involved within the project, a purely irrigation lease, and a dry land lease (Tr. p. 183). That the land involved consisted as follows: (Tr. p. 184)

"A. I would say it was quite a light sandy-like soil which is very subject to washing or blowing and therefore it always has been farmed as strip land.

"Q. Why has it been farmed as strip land rather than as irrigated land?

"A. Just because I would say it is not suitable to be irrigated . . .

"Q. And does this strip farming method stop the erosion?

"A. It does."

That the terrain of the land was not suitable for irrigation as a large gully runs through the land (Tr. p. 178, 186).

We direct the Court's attention to Tr. p. 192, where the witness testified to the payment of O & M charges during the year 1951, but this was refunded to him and the charges deleted from the lease.

The witness further testified with reference to defendant's Exhibit No. 11, (Tr. p. 193) which was the subsequent lease on the same land immediately following defendant's leases, and stated that no O & M

charges had been payable under that lease. It is interesting to note that this subsequent lease contained a provision **that no O & M charges would be payable until irrigation was established** (Tr. p. 193, 194). The witness further testified that as of December 1st, 1949, no irrigation service was established on the tracts indicated on plaintiff's Exhibit No. 1, by a circle around the "X" and a square around the "X" (Tr. p. 195). That existing ditches had filled with dirt as a result of blowing (Tr. p. 197), and many ditches were still full of dirt.

The next witness called by defendant was Frank Kuka, who stated he had made a survey of the land for Mr. Henneman and determined that the soil had moved and eroded during the winter which was caused by block farming (Tr. p. 200). In order to prevent erosion, strip farming methods are used and it is not possible to irrigate when that method is used. Erosion to the lands leased by the defendant commenced early in the 1930s and continued during all of the years Mr. Aiken leased the land (Tr. p. 203).

Clarence Parlemee, who previously resided twenty-nine years near Valier, Montana, and ranched one-half mile south of the defendant's lands, also testified to the continued erosion, and, further, that defendant strip-farmed during all of the time he leased the land. He testified that strip farming prevents erosion, while block farming tends to cause erosion, as the soil all blows away (Tr. p. 208).

With reference to the ditches, he stated they would not hold water as they overflowed because of dirt fill. In turn, the water will wash to a lower ditch which settles the silt and blocks lower ditches, and causes the water to flood and seek its lowest level (Tr. p. 211). The witness further testified that as far as he was concerned there was no irrigable land within the Blackfeet Indian Reservation.

Lloyd Campbell, Chairman of the Pondera County Allotment Program of the A.S.C., testified with reference to the type of farming practiced on the leased lands in question. According to the Pondera County ASC records, the land in question was stripped completely (Tr. p. 219), and this was verified by records made from aerial photographs (Tr. p. 221). The defendant's Exhibits Nos. 12 and 13 were introduced, which were made from aerial photographs, and clearly disclosed that only strip farming was practiced on the lands in question.

The defendant, Robert Aiken, testified he originally leased a portion of the lands involved in 1939 as follows: (Tr. p. 234)

"Q. Did you go on the land pursuant to a lease?

"A. No, Mr. Cross, the lease clerk at Browing, at that time I was looking for some land and he came down and told me he would take me up and show me this land and there was a lot of it had blown and big sand piles on it and he said if I would take the strip there, he would give me a lease on it and he said if I wanted water, I could pay for it in advance and get it."

He further testified he attempted to irrigate the land originally leased but the sod didn't want moisture, and thereafter he stripped it out (Tr. p. 235). The witness further classified the land involved as dry land (Tr. p. 235):

> "Because it is too rolling to irrigate and too light to do anything but strip it out and it will not blow away."

Mr. Aiken further testified that the land could not be irrigated by ditches in the area because they are not large enough and it is only possible to irrigate grain approximately ten days out of a year, and the ditches could not handle sufficient water to irrigate that much acreage (Tr. p. 236). The witness further testified that no demand was ever made for water under the two leases in question.

He further stated that much of the land in question was sod when he first took the leases and he later broke the same and stripped it, which stopped the erosion and blowing, and was in accordance with good farming practices (Tr. p. 251).

D. SPECIFICATIONS OF ERROR

1. That said judgment of the District Court is erroneous in that it adjudges that the Plaintiff, the United States of America have and recover from the Defendants, Robert Aiken, L. A. Wollam, Bernard W. Anderson, and Lloyd Campbell the sum of $4,385.03 as provided by Conclusions of Law No. 1 filed in said causes, and that the said Plaintiff further recover from the Defendants, Robert Aiken, L. A. Wollam, Bernard W. Anderson and Lloyd Campbell,

the sum of $553.95 as provided by Conclusions of Law No. 2 on file herein.

2. That the judgment of said District Court is contrary to the applicable law covering said action and the evidence adduced herein, and to the terminology of the leases in question;

3. That the evidence is insufficient to justify reformation of the lease as set forth in Conclusions of Law No. 1 herein, and the same was contrary to the applicable law covering said action;

4. That the evidence is insufficient to justify the judgment based upon Conclusions of Law No. 2 herein;

5. Upon the evidence the District Court was without jurisdiction to reform the lease referred to in Conclusions of Law No. 1 herein;

6. That the judgment of said District Court if enforced would amount to unjust enrichment of the said Plaintiff at the expense of the Defendants;

7. That the Plaintiff waived its rights to claim operation and maintenance charges by a failure to collect the same either in advance or during the terms of the leases in question;

8. That the said judgment is erroneous in that it varies the terms of the written instrument referred to in Findings of Fact No. 1 herein.

For convenience several of the above-named Specifications of Error relate substantially to the same questions. Therefore, the Appellant will argue Specifications of Error Nos. 1 and 3 together; Nos. 3, 5

and 8 together; and Specification No. 7 separately. Specifications of Error Nos. 2, 4 and 6 are related to the other Specifications; and will be generally argued in this brief.

E. SUMMARY

To briefly summarize for the Court the defendant's contentions, they mainly relate to the assessment by the lower Court of O & M charges under the 1944 lease which did not call for the same, and under the 1946 lease where brief mention was made of such charges; but they were neither demanded in advance nor at any time during the terms of the leases. No water was furnished, as good farming practices in the vicinity dictated that the land should be strip farmed as dry land. The character of the soil and the type of terrain did not permit irrigation.

It was doubtful whether irrigation ditches in the vicinity could carry water had it been demanded, and there was a substantial conflict in the testimony as to the location and accessibility of the existing ditches.

The lower Court reformed the 1944 lease to provide for irrigation charges, which resulted in a court-made contract, the terms of which were not agreed upon or contemplated by the parties at the time the lease was entered into.

If the Government is allowed to recover O & M charges it would amount to unjust enrichment for a service which was not contemplated by the parties,

never demanded or furnished during the leases in question. By failing to collect O & M charges in advance, or at any time during the terms of the leases, the Government waived its right to collect such charges, and cannot now attempt to collect the same after the lapse of a number of years.

Also, the Government cannot charge the defendant with its negligence in using an obsolete form and thus collect from the defendant that to which it is not entitled.

Ample authorities will be cited following this summary to back up and fortify every contention made by the defendant.

F. LAW AND ARGUMENT

The defendant's evidence was based entirely on a visual observation of the land in question by those thoroughly familiar with the same with reference to suitability for irrigation. Both prior and subsequent to the leases in question the land had been farmed as dry land. The Government's evidence was based entirely upon maps, the date of which was never fixed, except they were made many years prior to 1944, when the first lease in question was entered into. The Government based its claim on the irrigability of the lands, in addition to the maps, on several witnesses, none of whom were thoroughly familiar with the visible topography of the land; and also on various records in the office of the Superintendent of the Indian Agency, which purported to specify which

lands were irrigable and which were dry land. In addition, the Government attempted to charge the defendant with knowledge of the laws and regulations governing O & M charges which appeared in the 1944 lease, as follows: (Tr. p. 15)

> ". . . in accordance with the provisions of existing laws and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands. . ."

In effect, the Government admitted, by executing the 1944 lease containing the above-quoted language, that the same was in accordance with such rules and regulations, even though O & M charges **were not** inserted therein. To fortify this contention, F. H. McBride, the United States Indian Superintendent, certified that the lease was: (Tr. p. 31)

> ". . . approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force."

The 1946 lease contained practically identical terms except it specified as follows: (Tr. p. 32)

> "If this lease covers land within an irrigation project, the lessee is also obligated to pay in addition to the rental the irrigation charges as provided for in Section 6, in accordance with the leasing regulations. (Title 25—Indians, CFR, Part 171, as amended)."

The same terminology appears elsewhere in the 1946 lease (Tr. p. 33).

The Government contended that the defendant was charged with knowledge of these obsolete regulations

in the 1944 lease, which was an outdated form as admitted by the Government, when, in fact, this lease specified it was made in accordance with rules and regulations prescribed by the Secretary of the Interior.

The trial Judge very clearly recognized this omission of the Government when he stated: (Tr. p. 51)

> ". . . it does seem to the Court that a serious oversight or neglect has taken place for which the Government agents were responsible, and which might lead the defendant to believe that no water charges would be made, after so many years had elapsed before a demand for payment, which was due at the beginning of the irrigation season."

The Court further stated: (Tr. p. 51)

> ". . . the fact that he (the defendant) did not pay these charges in advance as required may have been due to neglect of the officer, whose duty it was to collect such charges when they became due . . . if it should ultimately appear that this Court (Federal District Court) is in error, relief will readily be obtainable." (parenthesis ours).

The Court was further aware of this negligent oversight of the Government when it stated: (Tr. p. 52)

> ". . . although the Superintendent of the reservation, or someone qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts."

It is further interesting to note, with reference to the 1944 lease, under Findings of Fact No. 3, (Tr. p. 53 and 54), that by reforming the 1944 lease defendant agreed to pay all operation and maintenance assessments against the land "annually in advance".

This finding of fact certainly does violence to the terminology of the 1944 lease as no mention was made therein with reference to O & M charges. This, in effect, reformed that lease to read exactly as the 1946 lease, which explicitly set forth such terminology. This resulted in a judgment requiring the defendant and his sureties to pay all O & M charges with interest to the date of the judgment and interest from the date of the judgment, together with the Government's costs. (Tr. p. 58, 59).

The main point involved the availability of water and suitability of irrigation ditches for irrigation purposes as contended for by the Government and whether the defendant can be charged with knowledge of Department of the Interior regulations with reference to irrigation.

The next contention concerns manifest inconsistencies in the provisions of the leases. In this connection we call the Court's attention to an explicit provision in the 1944 lease, reading as follows: (Tr. p. 19)

> "It is understood and agreed by and between the parties hereto that the lessee is to cultivate, improve, and farm the lands covered by this lease in a **husbandlike manner** to the best advantage; that **he is to commit no waste thereon . . .**" (Boldface ours).

The 1946 lease contained similar language, as follows: (Tr. p. 33)

> "All farm lands to be farmed in a **husbandlike manner** on a crop rotation basis, with at least one leguminous crop on all five-year leases." (Boldface ours).

Regardless of the type of land involved, the following inconsistent provision was also inserted in the 1946 lease: (Tr. p. 33)

"All land farmed as irrigated farm land on a crop rotation basis."

It is undisputed in this case that the land could not be farmed as irrigated land as the land consisted of light, sandy soil, subject to washing or blowing and which would cause erosion (Tr. p. 184, 195, 200, 208, 219, 235, 251).

In spite of this overwhelming testimony, the Government contended the defendant was compelled to irrigate the land and pay irrigation charges.

If the defendant irrigated the land as specifically required by the 1946 lease, he would be in default under the terms of the leases as he would not be farming the same in a husbandlike manner. The defendant, therefore, was penalized by the lower court for strip farming and preventing erosion, which was good farming practice in the vicinity, and did not irrigate the land as required by the leases. We, therefore, have a strange paradox presented by the very terms of the leases. **On one hand, husbandlike practices in the vicinity dictated that dry land should be strip farmed in order to comply with the leases, while the leases dictated that the land should be irrigated. On the other hand, if the defendant irrigated the land, the same would involve block farming and cause erosion, which would be a violation of the lease covenants to farm the land in a husbandlike manner.**

The lower Court, in effect, sustained the contention that the land should have been irrigated, or was susceptible to irrigation, and penalized the defendant for attempting to stop erosion by strip farming. This position is grossly inconsistent with sound business and farming practices.

Next we call the Court's attention to the provisions of the 1944 lease with reference to delinquencies: (Tr. p. 26)

> ". . . if the lessee hereto shall fail to pay the rents when due . . . the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises . . ."

The 1946 lease contains no such forfeiture clause. There is no evidence in this case that the Government attempted to collect any irrigation charges whatsoever in advance under either lease, and defendant contends that such constituted a waiver of such O & M charges. As previously stated, the trial Judge indicated there might be such a waiver (Tr. p. 51). The plaintiff relies on Regulation 25 CFR 171.26, (supra) which requires payment of irrigation charges in advance. By the terminology of the leases, and no demand being made on the defendant for irrigation charges when the defendant paid his annual rentals under the leases, the Government is estopped to assert the regulation quoted.

Montana adheres to the rule that acquiescence in a contract, after learning that it does not represent

the actual agreement, destroys the right of reformation. **Krueger** v. **Morris,** 110 Mont. 559, 107 P 2d 142. The evidence in this case is overwhelming that the Government acquiesced for nearly eight years in the non-payment of irrigation charges by defendant in not collecting the same in advance as was required by the 1946 lease.

If such provision is to be implied in the 1944 lease, the same premise is also true. In this connection we cite Sec. 49-108, RCM 1947, which states:

> "Acquiescence in error takes away the right of objecting to it."

The case of **Cook-Reynolds Co.** v. **Beyer,** 107 Mont. 1, 9, 79 P 2d 658 held as follows: A party seeking reformation of a contract on the ground of mistake in execution, after becoming aware of the mistake or the circumstances are such that he will be presumed to have known of it, acquiesces in the instrument:

> ". . . he loses his right to reformation . . . acquiescence . . . may be implied from an unreasonable delay in applying for redress after getting notice of the mistake . . .".

A mutual mistake for which a written instrument may be reformed must be reciprocal and common to both parties each alike laboring under the same misconception. **Thielbar Realties, Inc.** v. **National Union Fire Ins. Co.,** 91 Mont. 525, 9 P 2d 469.

We call the Court's attention to the fact that the 1944 lease form was made up in April, 1929, while the 1946 lease used the revised form of August 1943.

The Government's negligence thus penalized the defendant for its use of an obsolete form and attempts, in the present action, to revise the April 1929 lease form to read the same as the August 1943 form. This should not be contenanced by the Court.

An elementary principle with reference to reformation of an agreement is contained in Sec. 17-901, RCM 1947, under which provisions the plaintiff proceeded (Tr. p. 6). Those provisions read as follows:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

The Government alleged mutual mistake of the parties. Nowhere does the transcript disclose any such mutual mistake or even a mistake of one party which the other party at the time knew or suspected.

Sec. 17-903, RCM 1947, states the principle of revision as follows:

> "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be."

It is apparent from examination of the testimony in the instant case that the 1944 lease did not intend to bind the defendant for O & M charges, since these were not collected prior thereto, nor in subsequent

leases. This is also fortified by the uncontroverted testimony that the land was not susceptible to, or of, irrigation.

With reference to the 1946 lease, the plaintiff did not intend to assess O & M charges, or the same would have been collected in advance as required by the terms thereof. By reforming the 1944 lease, there was substituted a court made contract rather than one by the parties. In support of this we cite **Union Central Life Ins. Co.** v. **Jensen,** 74 Mont. 70, 76, 237 P. 518, where it was held:

> "Courts must give effect to every part of a contract so as to make its terms operative; they may not make a new contract for the parties, **nor read language into** or eliminate lawful terms therefrom unless the words employed are meaningless or involve an absurdity . . ." (Boldface supplied).

In further support of this rule, we cite **Emerson-Brantingham I. Co.** v. **Raugstad,** 65 Mont. 297, 304, 211 P. 305:

> "It is the province of the court to interpret contracts which are open to interpretation, not to make new ones for the parties, or to alter or amend those which they, themselves, have made."

The laws of Montana with reference to interpretation of contracts are clearly set forth in Sec. 13-704, RCM 1947, as follows:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The following section (Sec. 13-705, RCM 1947) clarifies the interpretation of written contracts:

> "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

If the decision of the lower Court is allowed to stand, it, in effect, varies the terms of a written instrument by parole evidence, which is not permissible in Montana unless the terms or expressions in the leases involved are of doubtful import and are uncertain and ambiguous. **Sutton** v. **Masterson,** 86 Mont. 530, 284 P. 264; **Lehrkind** v. **McDonnell,** 51 Mont. 343, 353, 153 P. 1012.

Sec. 13-706, RCM 1947, allows a writing to be reformed when through fraud, mistake or accident a written contract fails to express the real intention of the parties, and such intention is to be regarded and the erroneous parts disregarded. A Montana case decided under this section of the Code is **Humble** v. **St. John, et al.,** 72 Mont. 519, 522, 234 P. 475. That case held as follows:

> "Before equity will intervene to correct a mutual mistake in a written instrument, the evidence of the mistake must be clear, convincing and satisfactory."

In the instant case any mistake made was of a unilateral character and was made entirely by the Government herein and would, therefore, lack the mutuality required by the laws of Montana for reformation.

The Government was allowed to introduce evidence of preliminary negotiations leading up to the execution of the leases in question which consisted of an advertisement for bids for sale of farming and grazing leases (Tr. p. 10 to 14). That advertisement recognized strip farming methods in a dry land area and is consistent with the defendant's contention that good husbandry and farming practices required strip farming, when it stated: (Tr. p. 10)

> "Land in the dry land area must be farmed by the strip method and any new land broken must be stripped the third year and thereafter."

The advertisement further prohibited dry land farming in the irrigable area.

There was considerable conflict in the testimony with reference to whether the land leased to the defendant was located in the irrigable area, the Government basing its contention on obsolete maps and records and the defendant basing his contention on the actual experience of farmers residing in the locality with extensive farming experience. There was nothing in the notice of bids which would in any manner advise the defendant he was required to irrigate his leased land or to pay O & M charges. The advertisement for bids was flimsy evidence to charge the defendant with O & M assessments. This certainly did not constitute a preponderance of the evidence in this instance.

There was a unilateral mistake in the instant case, namely a Government clerk, using an absolete form

of lease, and the defendant cannot be charged with this mistake. The record is entirely devoid of any knowledge by the defendant of the use of such obsolete form, or that the Government intended to collect O & M charges under the leases.

Ayers v. Buswell, 73 Mont. 518, 238 P. 591, is predicated on the grounds of excusable negligence and in part is as follows:

> ". . . the mere fact that a party seeking a reformation of an instrument on the ground of mistake may himself have been negligent is not a ground for refusing relief; but if the negligence is **excusable** as where plaintiff is an old man and not accustomed to transact business, and defendant is a much younger man of extensive business experience, relief will be granted when, in view of all the circumstances, to deny it would permit plaintiff to suffer a gross wrong at the hands of "defendant." (Boldface ours)

The Blackfeet Indian Tribe, as an instrumentality of the Federal Department of the Interior and the the United States Government, may claim excusable neglect by using an obsolete form. However, the defendant was not versed in the procedure of leasing Indian lands, nor did he participate in the actual drafting of the instrument involved, and not possessing extensive legal and business experience or having knowledge of the regulation in question, (Reg. 25 CFR 171.26) should not be penalized for a mistake of the Government.

Another pertinent Montana statute relates to cases of an uncertainty in a written agreement. That statute

is Section 13-720, RCM 1947, which is as follows:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most stongly against the party who caused the uncertainty to exist."

It is readily apparent that any uncertainty, especially regarding the 1944 lease, was caused by the plaintiff in not including O & M charges in the lease. Interpreting the agreement most strongly against the Government, who caused the uncertainty to exist, the defendant should not be made to pay such charges as he was entirely innocent in the whole affair, and entered into the lease knowing full well such land was to be farmed by the strip method, and that it would be both unwise and impractical to irrigate the same. As has been previously stated, it would also amount to a breach of the covenant in the leases to farm the land according to good husbandry.

If the decision of the lower Court is allowed to stand, the defendant will suffer a gross wrong in having to pay for irrigation charges which were not collected in advance or at any time during the leases, for water which was not needed, never called for, or used, and it could not be delivered had he called for, or desired, the same.

It is well settled in Montana that reformation does not lie for a unilateral mistake which the other party, the defendant herein, had no knowledge of and did not suspect the particular clause in question was inadvertently omitted. We cite **Comerford** v. **U. S. F. & G. Co.,** 59 Mont. 243, 259, 196 P. 984.

The Government drafted the agreement on its own form, and the defendant, not being experienced in leases of this nature, as was the plaintiff, nor being represented by counsel, nor experienced in legal technicalities, executed the same.

The law requires clear and convincing proof that the failure of the agreement to express the true intent of the parties was the result of fraud, mutual mistake, or a mistake of one party, which the other at the time knew or suspected. **Brubaker** v. **D'Orazi,** 120 Mont. 22, 179 P. 2d 538.

The purpose and equity of reformation is not to make a new agreement, but to establish and perpetuate the true one, and courts cannot insert a provision intentionally, or inadvertently omitted therefrom, which the defendant had no knowledge of until long after his last Indian lease expired, or for a service which was neither rendered or offered to be rendered.

In further construing Sec. 17-903, RCM 1947 (supra), a normal inquiry would relate to the customary farming practices on the leased land in question, prior to, and subsequent to, the leases in question. The undisputed testimony in this case disclosed that the land was best adaptable to dry land farming, or strip farming, which was engaged in extensively in that area. Had the lower Court considered the intent of the instrument and its legal consequences, and the defendant's testimony as to farming practices, a different result would have been reached. The undisputed testimony showed the character of

the soil to be of a light sandy nature, which was not adaptable to irrigation. The contour of the land is also important, and the testimony disclosed there was a large gully running through the land that was uneven in character, which does not permit irrigation. There was considerable testimony with reference to land erosion prior to the defendant's leases and, hence, strip farming was practiced to prevent such erosion and preserve the land value for raising crops.

If irrigation was practiced on the land, the testimony showed it could not be stripfarmed, and further erosion would result, causing considerable damage to the land, and, most important, would not be consonant with good farming practices.

It is an elementary axiom of the law that it does not require the performance of useless or idle acts, nor does it require impossibilities. Sec. 49-123, 49-124, RCM, 1947.

The contention was made by the Government in the lower Court that the defendant Aiken was under an implied obligation to irrigate on a dry land farm in spite of the overwhelming testimony that water could not be used on the land in question. It cannot be implied from the contract of the parties that dry land farming was forbidden when the plaintiff failed to collect the irrigation assessment in advance as required by the 1946 lease, and that approximately eight years had elapsed before any attempt to collect such charges was made. The mere fact that the irrigation project had canals, the condition of which was

of doubtful character, is no evidence of any duty to irrigate the land when the plaintiff well knew that the defendant farmed it as a dry land unit during all of the years of the leases in question.

The Government further contended that the defendant was charged with knowledge of the rules and regulations which required users of water on the irrigation project to pay the O & M assessment annually in advance. This contention failed when the leases themselves solemnly declared they were made **in accordance** with the law and the rules and regulations prescribed by the Secretary of the Interior.

In accepting annual rentals from the defendant under the leases, the plaintiff accepted them in full performance of the leases by not insisting on the payment of O & M charges at the same time. This is fortified by the provisions of Sec. 58-401, RCM 1947:

> "Full performance of an obligation by the party whose duty it is to perform it . . . **if accepted by the creditor** extinguishes it . . ." (Boldface ours)

The conduct of the Government in not insisting upon the payment of O & M assessments, either in advance or at any time during the leases in question, is fully covered by the provisions of Sec. 58-429, RCM 1947:

> "The want of performance of an obligation, or of an offer of a performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:
>
> ". . . 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the

time at which such performance or offer may be made, and not rescinded before that time."

If there was an obligation on the defendant to pay O & M charges at the time the annual rentals were due under the leases, this obligation would constitute a condition concurrent as set forth in Sec. 58-207, RCM 1947:

"Conditions concurrent are those which are mutually dependent, and are to be performed at the same time."

Here, concurrent conditions consisted of the payment of the rentals under the leases, and at the same time, the payment of O & M charges in advance of the farming year. By not demanding O & M charges in advance, the Government breached the necessary concurrent conditions to entitle it to recover, and thereby waived its rights to collect such assessments long after the leases had terminated.

I. CONCLUSION

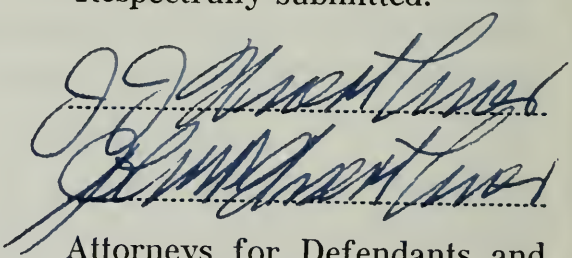
It should be readily apparent to the Court from the citation of numerous authorities and statutes, there is no legal basis for the Government to either assess or enforce the collection of O & M charges, together with interest thereon, and the lower Court was in error in this regard.

There was no evidence to justify reformation of the 1944 lease; neither do the applicable Montana Statutes permit reformation by the flimsy testimony of the plaintiff in support of reformation.

While the 1946 lease contained an indirect reference to O & M charges, the Government, by acquiescing in the non-payment of the same for many years during the leases, and subsequent thereto, waived its right to collect such charges. The authorities cited in this brief in support of this contention amply fortify appellant's position.

In conclusion, the appellant urges that the decision of the lower Court be reversed and judgment be entered for appellants. This is not only consonant with equity and the principles of law involved, but is in accordance with the overwhelming weight of the testimony which, in appellant's opinion, greatly preponderates in his favor.

Respectfully submitted.



Attorneys for Defendants and Appellants

APPENDIX TO APPELLANTS' BRIEF

Exhibits identified, offered, received, rejected or withdrawn as Evidence.

(Page numbers refer to transcript)

Ex. No.	Identified	Offered	Rejected	Received	Withdrawn
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